

A Azlin Azrai bin Lan Hawari v United Overseas Bank (M) Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-03(IM)(NCC)-20-02 OF 2016
ALIZATUL KHAIR, NALLINI PATHMANATHAN AND ZABARIAH
MOHD JJCA
12 JULY 2017

C *Bankruptcy — Bankruptcy notice — Setting aside — Respondent obtained final judgment against appellant — Respondent proceeded with judgment debtor summons ('JDS') — Appellant defaulted in payment of monthly installment as provided under JDS — Respondent filed bankruptcy notice against appellant — Whether respondent could commence bankruptcy proceedings as JDS already in place against appellant — Whether there had been modification or variation of original judgment — Whether appellant in breach of JDS — Whether original judgment nullified by JDS — Whether bankruptcy notice valid in light of different amount claimed — Bankruptcy Act 1967 ss 3(1)(i) & 5(1) — Debtors Act 1957 ss 3 & 8 — Rules of Court 2012 O 42 r 12*

E The respondent had obtained final judgment against the appellant for the sum of RM79,804,851.04 together with costs and interests. As the sum was not satisfied by the appellant, the respondent proceeded with obtaining judgment debtor summons order ('the JDS') against the appellant. The JDS provided, **F** inter alia, that the appellant to pay the monthly installment of RM5,000 until full settlement and costs of RM4,000 to the respondent. The appellant failed to comply with the monthly installment due on 13 March 2015 thereby breaching the terms of the JDS. Consequently, on 31 March 2015, the respondent filed a bankruptcy notice ('the BN') against the appellant pursuant **G** to the Bankruptcy Act 1967 ('the BA') and Bankruptcy Rules 1969. In response, the appellant filed the present application to set aside the BN ('the present appeal'). The issues to be determined by the court were: (a) whether the respondent could commence bankruptcy proceedings as the JDS was already in place against the appellant; (b) whether there had been a modification or **H** variation of the original judgment; (c) whether the appellant had been in breach of the JDS; (d) whether the original judgment was nullified by the JDS; and (e) whether the BN was valid in the light of the different amount claimed. In relation to issue (e), the appellant submitted that: (i) the BN demanded in excess of RM54.53 ie for the interest; (ii) the BN did not include the maturity **I** dates for the performance guarantees ('PG') and financial guarantee ('FG') banking facilities; and (iii) the BN failed to reflect payment already made by the appellant on 31 March 2015. It must be noted that there were two similar

appeals premised on similar causes of action and issues as in the present case, ie Appeal Nos W-03(IM)(NCC)-19 of 2016 and W-03(IM)(NCC)-21 of 2016. Parties agreed that the decision of the present appeal would bind these other two appeals.

Held, dismissing the three appeals with costs of RM15,000 subject to allocator:

- (1) The JDS is no bar to proceedings in execution. The effect of s 8 of the Debtors Act 1957 ('the DA') is that it is a statutory authority that keeps other forms of execution alive. Following thereto, an order to pay by installments of a judgment debt does not prevent the execution of a judgment (see paras 27 & 31).
- (2) In the present appeal, since execution was not prevented nor stayed with the issuance of the JDS order, then the respondent had met the requirements for the committal of an act of bankruptcy under s 3(1)(i) of the BA namely, the judgment was a final one, the appellant had failed to comply with the BN and more pertinently, the execution of the judgment was not stayed. Since the appellant had committed an act of bankruptcy, therefore, it followed that the BN was valid and there were no merits in the application by the appellant to set aside the BN (see paras 36–37).
- (3) Based on s 3 of the DA, it was clear that the JDS was an execution proceeding. The net result was that there was no modification or variation of the original judgment by virtue of the JDS order. Therefore, the respondent was entitled to commence bankruptcy proceedings against the appellant concurrently with the JDS order (see paras 42–43 & 47).
- (4) From the evidence, the appellant had made payment after the BN was issued against the appellant on 31 March 2015. The cheque for the installment payment was received by the respondent's solicitor on 31 March 2015 at 4.15pm after the BN was filed. The cheque could only be cashed in on 1 April 2015. Effectively, there had not been any payment made before the BN was filed (see para 49).
- (5) The original judgment had never been set aside nor overturned on appeal and thus it remained valid and enforceable. The JDS order which allowed for installment payments did not mean that it nullified the original judgment (see para 51).
- (6) In relation to issue (e), the court agreed with the learned judge that interest on costs was claimable from the date of judgment pursuant to O 42 r 12 of the Rules of Court 2012. Further, the judgment clearly stated the amount payable for the PG facility which was RM5,300,000 as

- A at 28 February 2011 and interest chargeable on the sum thereon shall be at the rate of 3.5% above the respondent's base lending rate calculated on monthly rested from 1 March 2011 until the date of full payment. As for the FG facility, the judgment provided for the interest rate of 3.5% above the respondent's base lending rate calculated on monthly rested from 31 March 2009 (ie the maturity date of FG facility) until the date of full payment. With regards to the payment made by the appellant on 31 March 2015, the court agreed with the learned judge that the acceptance of payment by the respondent did not nullify the BN as the outstanding amount due was over and above the statutory limit as provided under s 5(1) of the BA. In totality, the bankruptcy jurisdiction under s 3(1)(i) of the BA was validly invoked (see paras 54–55 & 59–61).
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[Bahasa Malaysia summary]

- D Responden telah mendapat penghakiman muktamad terhadap perayu bagi jumlah sebanyak RM79,804,851.04 bersama dengan kos dan faedah. Oleh kerana jumlah tidak dipenuhi oleh perayu, responden telah meneruskan untuk mendapatkan penghakiman perintah saman penghutang penghakiman ('JDS') terhadap perayu. JDS memperuntukkan, antara lain, bahawa perayu
- E membayar ansuran bulanan sebanyak RM5,000 sehingga penyelesaian penuh dan kos sebanyak RM4,000 kepada responden. Perayu gagal untuk memenuhi ansuran bulanan kena yang dibayar pada 13 Mac 2015 dengan itu melanggar terma-terma JDS. Akibatnya, pada 31 Mac 2015, responden memfailkan notis kebangkrutan ('BN') terhadap perayu menurut Akta Kebankrutan 1967 ('AB') dan Kaedah-Kaedah Kebankrutan 1969. Membalas, perayu memfailkan permohonan ini untuk mengetepikan BN ('rayuan kini'). Isu untuk penentuan mahkamah adalah: (a) sama ada responden boleh memulakan prosiding kebangkrutan memandangkan JDS sudah dikenakan terhadap perayu; (b) sama ada terdapat pengubahsuaian atau pengubahan penghakiman asal; (c) sama ada perayu telah melanggar JDS; (d) sama ada penghakiman asal telah dibatalkan oleh JDS; dan (e) sama ada BN adalah sah disebabkan perbezaan amaun yang dituntut. Berkaitan dengan isu (e), perayu mengemukakan bahawa: (i) BN menuntut jumlah lebih sebanyak RM54.53 iaitu untuk faedah; (ii) BN tidak memasukkan tarikh matang untuk pelaksanaan jaminan ('PG') dan jaminan pembiayaan ('FG') kemudahan perbankan; dan (iii) BN gagal untuk menunjukkan bayaran yang sudah dibuat oleh perayu pada 31 Mac 2015. Hendaklah diambil perhatian bahawa terdapat dua rayuan yang serupa berdasarkan kausa tindakan dan isu yang serupa seperti kes ini, iaitu Rayuan No W-03(IM)(NCC)-19 Tahun 2016 dan W-03(IM)(NCC)-21 Tahun 2016.
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- I Pihak-pihak bersetuju bahawa keputusan rayuan ini akan mengikat lagi dua rayuan itu.

Diputuskan, menolak ketiga-tiga rayuan dengan kos sebanyak RM15,000 tertakluk kepada alokatur:

- (1) JDS tidak menghalang prosiding pelaksanaan. Kesan s 8 Akta Penghutang 1957 ('AP') adalah bahawa ia adalah kuasa statutori yang mengekalkan bentuk pelaksanaan lain berterusan. Berikutan itu, satu perintah untuk membayar melalui ansuran hutang penghakiman tidak menghalang pelaksanaan penghakiman (lihat perenggan 27 & 31). A
 - (2) Dalam rayuan ini, memandangkan pelaksanaan tidak dihalang atau digantung dengan pengeluaran perintah JDS, maka responden telah memenuhi kehendak untuk komital bagi satu tindakan kebangkrapan di bawah s 3(1)(i) AB iaitu, penghakiman adalah muktamad, perayu telah gagal untuk memenuhi BN dan paling utama, pelaksanaan penghakiman tidak digantung. Memandangkan perayu telah melakukan satu tindakan kebangkrapan, maka, ia diikuti BN adalah sah dan tiada merit dalam permohonan perayu untuk mengetepikan BN (lihat perenggan 36–37). B
 - (3) Berdasarkan s 3 AP, adalah jelas bahawa JDS adalah prosiding pelaksanaan. Keputusan bersih adalah bahawa tiada pengubahsuaian atau perubahan terhadap penghakiman asal menurut kuasa perintah JDS. Maka, responden berhak untuk memulakan prosiding kebangkrapan terhadap perayu serentak dengan perintah JDS (lihat perenggan 42–43 & 47). C
 - (4) Daripada keterangan, perayu telah membuat bayaran selepas BN telah dikeluarkan terhadap perayu pada 31 Mac 2015. Cek untuk pembayaran ansuran telah diterima oleh peguam responden pada 31 Mac 2015 pada 4.15 petang selepas BN difailkan. Cek hanya boleh ditunaikan pada 1 April 2015. Hakikatnya, tidak terdapat apa-apa pembayaran dibuat sebelum BN difailkan (lihat perenggan 49). D
 - (5) Penghakiman asal tidak pernah diketepikan mahupun diakas atas rayuan dan oleh itu ia kekal sah dan boleh dilaksanakan. Perintah JDS yang membenarkan untuk pembayaran ansuran tidak bermakna ia membatalkan penghakiman asal (lihat perenggan 51). E
 - (6) Berkaitan dengan isu (e), mahkamah bersetuju dengan hakim bijaksana bahawa faedah terhadap kos oleh dituntut dari tarikh penghakiman menurut A 42 k 12 Kaedah Mahkamah 2012. Selanjutnya, penghakiman jelas menyatakan jumlah boleh dibayar untuk kemudahan PG yang mana adalah RM5,300,000 pada 28 Februari 2011 dan faedah boleh caj pada jumlah pada masa itu hendaklah pada kadar 3.5% di atas kadar pinjaman asas responden yang dikira pada bulanan bermula dari 1 Mac 2011 sehingga tarikh pembayaran penuh. Untuk kemudahan FG, penghakiman memperuntukkan kadar 3.5% di atas kadar pinjaman asas responden yang dikira bulanan bermula dari 31 Mac 2009 (iaitu tarikh matang kemudahan FG) sehingga tarikh pembayaran penuh. Berkenaan pembayaran yang dibuat oleh perayu pada 31 Mac 2015, mahkamah bersetuju dengan hakim bijaksana bahawa penerimaan pembayaran oleh F
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- A responden tidak membatalkan BN kerana jumlah tertunggak telah melampaui dan melebihi had statutori seperti yang diperuntukkan di bawah s 5(1) AB. Secara keseluruhan, bidang kuasa kebangkrutan di bawah s 3(1)(i) AB digunakan dengan sah (lihat perenggan 54–55 & 59–61).]

B
Notes

For cases on setting aside bankruptcy notice, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3337–3339.

C **Cases referred to**

- Ahna Lana Velathan v Vina Chinniah and S Sithambaram* [1939] 1 MLJ 34 (refd)
Ahna Moona Muthuraman Chettiar (Substituted Under Order Of Court Herein Dated 25th October 1935) v KN Nair & Ors [1938] 1 MLJ 177 (refd)
D *Chen Sing Chew; ex-parte: Oriental Tin Smelters Sdn Bhd, Re* [1974] 2 MLJ 69 (refd)
Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd [1992] 2 MLJ 344, SC (distd)
Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 MLJ 1; [2015] 4 CLJ 561, FC (refd)
E *HA Pereira ex parte Pagor Singh (Bhagat Singh), Re* [1932] 1 MLJ 112 (refd)
J Raju a/l M Kerpayya v Commerce International Merchant Bankers Bhd [2000] 3 MLJ 177; [2000] 3 CLJ 104, CA (refd)
Kuna Sockalingam Mudaliar v Yang Saripah & Anor [1954] 1 MLJ 11, CA (refd)
F *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, SC (refd)
Montgomery & Co v De Bulmes [1898] 2 QB 420, CA (refd)
Moscow Narodny Bank Ltd v Ngan Ching Wen [2005] 3 MLJ 693, FC (refd)
Sturdee (a debtor), Re [1985] 2 NZLR 627, HC (refd)
G *Watson, Re, ex parte Johnston, Johnston v Watson* [1893] 1 QB 21, CA (refd)

Legislation referred to

- Bankruptcy Act 1967 ss 3(1), 3(1)(i), (2), 5(1), 5(1)(a)
Bankruptcy Rules 1969 rr 18, 95
H Civil Procedure Code [SG] O 40 rr 16, 30(3)
Debtors Act 1957 ss 3, 4(1), (6), (7), 8
Debtors Ordinance of the Straits Settlements (SS Cap 48) [SG] s 6(2)
Insolvency Act 1967 [NZ] s 19(1)(d)
Rules of Court 2012 O 42 r 12
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Appeal from: Bankruptcy No 29NCC-1787 of 2015 (High Court, Kuala Lumpur)

Bastian Pius Vendargon (Wong Rhen Yen, Hanif bin Idris, Mohamed Fadzil bin Abdul Rahman and Afdhilani bt Jusof @ Alias with him) (Hanif Idris & Assoc) for the appellant.

Ng Sai Yeang (Lim Siew Ming and Loh Kah Hey with him) (Raja Darryl & Loh) for the respondent.

Zabariah Mohd JCA:

[1] The appellant/judgment debtor ('the JD') appealed against the decision of the learned High Court judge dated 28 January 2016 which had affirmed the decision of the learned senior assistant registrar's ('SAR') decision dated 26 August 2015, in dismissing the JD's application to set aside the bankruptcy notice dated 31 March 2015 ('BN') issued by the respondent/judgment creditor ('the JC').

[2] It is to be noted that there are two similar appeals premised on similar causes of action and issues relating thereto, ie Appeal Nos W-03(IM)(NCC)-19 of 2016 and W-03(IM)(NCC)-21 of 2016. Parties agreed that the decision of the present appeal would bind these other two appeals.

[3] After hearing the submissions from parties and perusing through the appeal records of the present appeal, we are of the unanimous view that there are no merits in the appeal and therefore dismissed the three appeals. Herein below are our grounds.

BACKGROUND

[4] On 11 August 2011, the JC had obtained final judgment against the JD for the sum of RM79,804,851.04 together with costs and interests. The final judgment was however, not satisfied.

[5] On 28 September 2011, the JC commenced judgment debtor summons ('JDS') proceedings against the JD. In the JDS proceedings, the JC obtained an order against the JD on 13 November 2014, whereby the senior assistant registrar ('SAR') ordered the JD to pay:

- (a) RM3,520,000 forthwith to the JC as partial satisfaction of the final judgment;
- (b) RM5,000 per month until full and final settlement of the judgment; and
- (c) RM4,000 as the costs,

with a default clause that, in the event the JD failed to comply with the terms

A of the JDS order, enforcement proceedings may be taken against the JD ('the JDS order').

[6] The JD appealed against the JDS order to the judge in chambers.

B [7] On 9 December 2014, in the appeal before the judge in chambers, the learned High Court judge allowed the appeal in part with costs of RM4,000 and ordered that:

- C (a) the JDS order ordering the JD to pay the sum of RM3,520,000 forthwith to the JC is set aside; and
- (b) the JDS order ordering the JD to pay the monthly installment of RM5,000 until full settlement and costs of RM4,000 to the JC, remain unchanged.

D ('the JDS appeal order')

E [8] In complying with the JDS appeal order, the JD made payments to the JC in the following manner:

- (a) on 12 January 2015, the JD paid RM13,000 being payment for costs and monthly installment payment for one month starting from 13 November 2014;
- F (b) on 29 January 2015 the JD paid RM15,000 being the monthly installment payment for three months starting from 13 December 2014; and
- (c) on 31 March 2015 the JD paid RM15,000 being the monthly installment payment for three months starting from 13 March 2015.

G [9] It was contended by the JC that the JD failed to comply with the monthly installment due on 13 March 2015 thereby breaching the terms of the JDS order.

H [10] As a result, on 31 March 2015, the JC filed a bankruptcy notice ('BN') against the JD pursuant to the Bankruptcy Act 1967 and Bankruptcy Rules 1969.

I [11] On 27 April 2015, the JD filed an application to set aside the BN vide summons in chambers ('encl 4') premised on the following grounds:

- (a) the JC is estopped from commencing with bankruptcy proceedings on grounds that the JD had moved the court and obtained the JDS order in

the JDS proceedings which orders the JD to pay a monthly installment of RM5,000 to the JC until full and final settlement of the judgment;

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(b) the JD had and still, complies with the terms of the JDS order and JDS appeal order by making monthly installment payments;

(c) the BN is void ab initio for non compliance with the final judgment; and

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(d) the BN is void ab initio as the amount claimed is inaccurate and excessive.

[12] The application in encl 4 was dismissed by the SAR on 26 August 2015.

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[13] The JD appealed to the judge in chambers and it was dismissed by the learned judge on 28 January 2016. The basis of the dismissal by the learned judge in his grounds are namely:

(a) that the JD had initiated the wrong mode to challenge the bankruptcy notice. As the JD's challenge was premised on the sum claimed in the BN, the JD should have filed an affidavit under r 95 of the Bankruptcy Rules 1969 and not vide summons in chambers under r 18 of the same (this constitutes preliminary issues raised by the JC in its written submission, however, since the appeal on the matter is already before us, we decided to hear the appeal on its merits rather than on preliminary points and/or procedural grounds);

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(b) although the JDS was already in place, the BN is valid;

(c) the JD had breached the JDS order when he failed to make monthly installment payments as agreed pursuant to the JDS order; and

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(d) the BN reflects the terms of the judgment which was obtained against the JD. The sum as in the BN is correct as at the date of the BN. The BN is thus valid.

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The JD's contention

[14] We noted that the main ground of appeal relied on by learned counsel for the JD in the arguments before us are as follows.

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[15] Firstly, it was contended that the learned judge had erred in allowing the JC to commence bankruptcy proceedings when the JDS is in place and which order the JD purportedly complied with.

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[16] It was submitted that the JC is estopped from initiating the bankruptcy proceedings against the JD since the final judgment was modified by the JDS order and the parties are bound and subject to the terms of the JDS order.

- A [17] In support of this contention, the case of *Re HA Pereira ex parte Pagor Singh (Bhagat Singh)* [1932] 1 MLJ 112 was referred to us wherein Mudie J had the occasion to consider whether the judgment was modified by the order for the payment by installments and that whether a bankruptcy notice which was founded on the judgment as it originally stood was invalidated.
- B It was submitted by learned counsel for the JD that *Re HA Pereira* is a case which is almost on all fours with our present appeal. Mudie J referred to the judgment in *Montgomery & Co v De Bulmes* [1898] 2 QB 420 where he said that:
- C The ground of the judgment in *Montgomery & Co v De Bulmes* is that the judgment was modified by the order for payment by installments. Chitty LJ in the course of his judgment says:
- D It seems to me that so long as the County Court Judge's order stands here there is a modification of the order of the High Court; and it would involve a great injustice to a defendant if it were not so. The defendant is told that he is to pay by installments, and the installments in such a case is generally small ... A man in such a position exerts himself in order to get the money together for the purpose of complying with the order. He does so under stress of a liability to imprisonment if he makes default, but I think he would likely to be misled, and
- E it would put him in a hard position if he were told that he was still liable, in spite of that, to pay the whole debt, and that what goods he had could be taken in execution.
- F In my view the same principle is applicable to a bankruptcy notice. The judgment is modified by the order for payment by installments, and it seems to me that the bankruptcy notice, which is founded on the judgment as it originally stood, thereby invalidated.
- G Learned counsel for the JD also referred to us, the judgment of Gun Chit Tuan SCJ in the Supreme Court of *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 2 MLJ 344 which had made reference to *Re HA Pereira*. Learned counsel for the JD concluded that the facts in our present appeal are more cogent than *Re HA Pereira* and *Datuk Mohd Sari* because the bankruptcy proceedings was initiated after the JC had obtained the JDS order.
- H
- I [18] Coming back to our present appeal, in compliance with the JDS order (read together with the JDS appeal order) at the material time when the BN was filed, the JD has made monthly installment payments until 12 June 2015. The JD contended that at no time had the JD defaulted in making monthly installments under the JDS order (read together with the JDS appeal order) as the JDS order does not specify when the JD is required to make payments of monthly installments to the JC.

[19] Even if there is a default in the payment of any installment under the JDS order (which was denied by the JD), the only remedy available for the JC, is to commence committal proceedings against the JD as the JDS order contains a default clause as to enforcement.

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[20] The JDS order (read together with the JDS appeal order) is governed by s 4(7) of the Debtors Act 1957 where the JD is subjected to committal proceedings in the event of default of the JDS order and the JDA appeal order. Section 4(7) of the same reads:

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If the judgment debtor makes default in payment according to any such order, a notice in the form prescribed by rules of court may be issued, on the request of the judgment creditor, calling upon judgment debtor to attend before the court at a time therein stated and show cause why he should not be committed to prison for such default.

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It is explicit that if there is default in the payment of installments the only remedy is to commence committal proceedings as provided under s 4(7) of the same.

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[21] Therefore it was contended that the JC is estopped from filing the BN against the JD because the JDS order and the JDS appeal order are still in force and there has not been any default on the part of the JD in making the monthly installments.

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[22] Further, it was contended that, the learned judge had erred when he concluded that the BN was valid when the BN reflects a sum which is allegedly excessive. The BN is void as the amount is inaccurate and excessive namely:

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- (a) on 31 March 2015 (ie the date when the BN was filed) the JD had made payment of RM1,500 pursuant to the JDS order to JC's solicitors by a bank draft. This payment is not reflected at all in the BN; and
- (b) the BN also demanded in excess RM54.53 which is the interest calculated at the rate of 5% from 11 August 2011–31 March 2015 on the costs of RM300, although the final judgment does not provide for the same.

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Counsel for the JD referred to us the case of *J Raju all M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177; [2000] 3 CLJ 104, where the final judgment made no mention of penalty interest or stamp duty but the BN had included the same. It was held by this court that a bankruptcy notice that requires a debtor to pay a judgment debt that is otherwise in accordance with the terms of the judgment is null and void ab initio.

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[23] Similarly in our present appeal, the claim is not what was awarded by the final judgment. The final judgment makes no mention of an interest rate of

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5% on the costs of RM300, nonetheless the BN had included a claim for the same starting from 11 August 2011–31 March 2015. This, according to the JD, is clearly contravening the Bankruptcy Act 1967 which mandates that the demand made in the BN must be in accordance with the terms of the judgment or order.

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[24] Hence, the JD contended that the above defects in the BN are not mere irregularities which could be cured and strict compliance of the procedures must be adhered to. Following thereto, the JD concluded that, any defects ought to be decided in favor of the JD.

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FINDINGS

D

Whether the JC can commence bankruptcy proceedings as the JDS was already in place against the JD

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[25] The learned High Court judge found that the JC can proceed to issue the BN for bankruptcy proceedings as under s 3(1) of the Bankruptcy Act 1967, it provides that, a judgment creditor who has obtained a final order against a judgment debtor for any amount and execution thereon had not been stayed, was entitled to commence a bankruptcy proceeding against the judgment. He relied on a High Court case of *Re Chen Sing Chew; ex-parte: Oriental Tin Smelters Sdn Bhd* [1974] 2 MLJ 69, where it was held that earlier orders directing payment by installments did not invalidate the bankruptcy proceedings. In that case, despite there being an order of payment by installments, a subsequent bankruptcy proceeding taken was held to be valid.

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[26] We are of the view that the learned JC had not erred when he held as such, for the following reasons.

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[27] Firstly, the JDS is no bar to proceedings in execution. The JDS order is made pursuant to the Debtors Act 1957. It is a law promulgated by Parliament to consolidate the laws in relation to debtors which are to be found in the Debtors Ordinance of the Straits Settlements (SS Cap 48) and the Civil Procedure Codes and Rules of Court and to ensure uniformity throughout the Federation. The JDS order was made pursuant to s 4(1) and 4(6) of the Debtors Act 1957 which provides that:

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(1) Where the judgment of a court is for the recovery or payment of money ... the party entitled to enforce it ... may, subject to and in accordance with any rules of court, summon the judgment debtor, ... to be orally examined before the court respecting the judgment debtor's ability to pay or satisfy the judgment debt ...

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...

- (6) Upon such examination or non appearance ... the court may order the judgment debtor to pay the judgment debt either — **A**
- (a) in one sum whether forthwith or within such period as the court may fix; or
- (b) by such installments payable at such times as the court may fix. **B**

[28] Accordingly, the JDS order prescribes that the JD is required to pay monthly installments of RM5,000 to the JC until full and final settlement of the judgment debt. **C**

[29] Further s 8 of the Debtors Act 1957 provides that:

Subject to any rules of court, *an order for the payment of installments of a judgment debt* under this Part (of which section 4 *of the same Act falls under*) *shall not be a bar to proceedings in execution* unless and except to the extent that the court shall so direct. **D**

[30] Horne J had occasion to consider the effect of the predecessor to s 8 of the Debtors Act 1957, ie s 6(2) of the Debtors Ordinance in the Singapore case of *Ahna Moona Muthuraman Chettiar (Substituted Under Order Of Court Herein Dated 25th October 1935) v KN Nair & Ors* [1938] 1 MLJ 177 when he was comparing the effect of an installment order made under the Debtors Ordinance and one made under O 40 r 30(3) of the Civil Procedure Code then. He was of the view that an order under O 40 r 30(3) of the Civil Procedure Code clearly falls within the proviso of O 40 r 16 of the same and there is no statutory procedure leaving other forms of execution open to the judgment creditor while the installment order is in force. Order 40 r 16 provides that, 'every person to whom a sum of money or any costs are payable, shall as soon as the money or costs are payable, be entitled to sue out one or more writ or writs of seizure and sale subject nevertheless as follows: **E**

- (a) if the judgment or order is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period; and **F**
- (b) the court or judge may at any time after the time of giving judgment or making the order stay execution until such time as it or he thinks fit. **G**

The right to sue out the writ depends upon something being payable under the judgment or order and if a time is fixed for payment then by proviso (a) the writ cannot issue until the time expires'. However, an installment order under the Debtors Ordinance requires a statutory authority to keep other forms of execution alive. Horne J further acknowledged that: **I**

Section 6(2) (of the Debtors Ordinance) provides that an installment order under

A Part 1 of the Debtors Ordinance shall not be a bar to proceedings in execution ...

[31] Similarly, the effect of s 8 of the Debtors Act 1957 is that it is a statutory authority that keeps other forms of execution alive. Following thereto, an order to pay by installments of a judgment debt does not prevent the execution of a judgment.

B

[32] The facts of the present case show that the JD had defaulted in his installment payments which were in breach of the JDS order. In this respect:

C (a) the monthly payment (RM1,500 for Sim Kok Beng (Appeal No W-03(IM)(NCC)-21 of 2016) and RM5,000 for Azlin) which was due on 13 March 2015 was not paid until after the BN was filed on 31 March 2015 at 11.40am; and

D (b) the cheque for the monthly installment was then received by the JD's solicitors on 31 March 2015 at 4.15pm but could only be cashed in on 1 April 2015.

E [33] Bankruptcy proceedings are commenced and premised upon an act of bankruptcy committed by the debtor. Section 3(1)(i) of the Bankruptcy Act 1967 provides that:

F (i) If a creditor has obtained a *final judgment or final order* against him for any amount *and execution thereon not having been stayed* has served on him in the federation ... a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice ... *and he does not within seven days after service of the notice* in case the service is effected in Malaysia *either comply with the requirements of the notice* or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained.

G

H As far as our present appeal is concerned, the fact shows that:

I (a) the JC has obtained final judgment against the JD;
(b) there has been no stay of execution of the final judgment; and
(c) the JD has not complied with the BN within seven days of the service of the notice.

[34] In respect of the requirement of paragraph (a), ie there was a final judgment, there is no dispute that there was one against the JD. What is perhaps an issue would be the requirement in para (b), ie whether JDS

proceeding amounted to a stay of execution of the judgment. We are of the view that it is not.

A

[35] The very same issue as to whether a JDS constituted an implied stay of execution and hence prevented the issuance of a bankruptcy notice was duly considered in the New Zealand High Court case of *Re Sturdee (a debtor)* [1985] 2 NZLR 627 which was referred to us by counsel for the JC. Although the decision therein was against the backdrop of the New Zealand Insolvency Act 1967, the principle which can be distilled therefrom is applicable to the present appeal as s 19(1)(d) of the New Zealand Insolvency Act 1967 bears resemblance to s 3(1)(i) of the Bankruptcy Act 1967. There, the judgment debtor argued that another mode of execution, which the judgment summons is, and which had been commenced and remained incomplete, constituted an implied stay. The court considered s 19(1)(d) of the New Zealand Insolvency Act 1967 which permits the issuance of a bankruptcy notice if a creditor has obtained a final judgment upon which execution has not been stayed. It was held that:

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... the issue of a judgment summons, without more, does not give rise to any implied stay. The mere presence of a judgment summons does not prevent the debtor from complying with a bankruptcy notice. Accordingly, I hold the debtor on this head of argument.

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The court in *Re Sturdee* was of the view that there was no implied stay of execution by the mere presence of a judgment summons and held that the judgment debtor must comply with the bankruptcy notice.

F

[36] Coming back to the appeal that is before us, since execution is not prevented nor stayed with the issuance of the JDS order, then the JC has met the requirements for the committal of an act of bankruptcy under s 3(1)(i) of the Bankruptcy Act 1967 namely, the judgment is a final one, the JD had failed to comply with the BN and more pertinently, the execution of the judgment is not stayed.

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[37] Since the JD has committed an act of bankruptcy, therefore, it follows that the BN is valid and there are no merits in the application by the JD to set aside the BN.

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[38] As s 8 of the Debtors Act 1957 provides that an order for the payment of installment payments shall not be a bar to proceedings in execution save and except to the extent that the court shall so direct, it is to be noted that, when the court granted the JDS order, there was no direction from the court as to the extent of any permissible execution proceedings pursuant to this said section, ie there was no limitation nor conditions set out on execution in the JDS order.

I

A *Whether there has been a modification or variation of the original judgment*

[39] Learned counsel for the JD submitted that, there has been a modification and a variation of the original judgment by the order of the JDS. It was contended that the BN cannot be founded on the original judgment but should be premised on the second varied order ie the JDS order. The case of *Re HA Pereira Ex parte Pagor Singh (Bhagat Singh)* relied on by the JD concerned an application to set aside a bankruptcy notice on the ground that an order was subsequently made for payment of the judgment debt by installments. Mudie J was of the view that the judgment was modified by the order for payment of installments and therefore it followed that the bankruptcy notice which was founded on the judgment as it originally stood, was thereby invalidated. As a result, the bankruptcy notice was subsequently set aside. Later cases of *Ahna Lana Velathan v Vina Chinniah and S Sithambaram* [1939] 1 MLJ 34 and *Kuna Sockalingam Mudaliar v Yang Saripah & Anor* [1954] 1 MLJ 11 were also referred to us, to establish the fact that an order for the manner of payment in installments amounts to a variation of the decree.

[40] Counsel for the JC referred to us, the rationale of Lord Esher in *Watson, Re, ex parte Johnston, Johnston v Watson* [1893] 1 QB 21 wherein he opined that the power of ordering the debtor to pay by installment is not 'execution' but are decrees or judgments themselves, which was followed subsequently in our local cases in *Ahna Lana Velathan v Vina Chinniah and S Sithambaram* [1939] 1 MLJ 34 and *Kuna Sockalingam Mudaliar v Yang Saripah & Anor* where Wilson J said in his judgment that:

It remains only to consider whether or not an order to satisfy a decree by paying in installments is execution. In my opinion it is not and it is merely a variation of the decree which is, in effect, an order for a defendant to satisfy the amount of the decree with interest and costs by one lump sum payment forthwith. That order, in my opinion, cannot be regarded as execution of the decree nor do I think that a subsequent variation of that order for payment by installments can be regarded as execution.

[41] We are of the view that those cases cited by the JD (*Re HA Pereira, Ahna Lana Velathan v Vina Chinniah and S Sithambaram, Kuna Sockalingam Mudaliar v Yang Saripah & Anor*) were cited primarily for the proposition that such orders under a JDS are decrees or judgments in themselves and that these cases precede our current Debtors Act 1957.

The facts in the case of *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd* which was referred to us by counsel of the JD, was decided premised on facts which are different to the present Appeal that is before us.

In *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd*, there was a consent judgment obtained against the appellant and subsequently the appellant offered to pay the said judgment by way of monthly installments. The offer was accepted by the respondent and the respondent issued receipts for seven installments. There was no term nor condition stipulated to provide for eventuality of a default in any payment of any installment. The appellant subsequently defaulted for the months of August–December 1989. This resulted in the respondent issuing a bankruptcy notice. The appellant applied to set aside the bankruptcy notice which was dismissed by the High Court. The appellant appealed to the Supreme Court where he contended that the respondent was estopped from issuing out the bankruptcy notice as there was already an agreement for settlement of the judgment sum by way of installments payments and there was no default provision in the agreement between the appellant and the respondent. The Supreme Court allowed the appeal premised on the grounds that there was nothing in the agreement between the appellant and the respondent of any default provision in the payment of any installment that in the event of any default, the judgment creditor was entitled to proceed to issue the bankruptcy notice in respect of the balance due on the judgment debt. It was also held that the terms of the consent judgment was controlled by an outside agreement between the judgment creditor and the judgment debtor and non compliance with the judgment is not an act of bankruptcy. Further the Supreme Court held that the demand for payment in the bankruptcy notice was not in accordance to the terms of the consent judgment as was required by s 3(1)(i) of the Bankruptcy Act 1967. The demand for payment was regulated by the terms of the agreement between the parties and therefore the non compliance with such notice could not constitute an act of bankruptcy on strict construction of the Bankruptcy Act 1967.

Clearly, *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd* can be distinguished from our present appeal on its facts. The facts in our present appeal does not concern a consent judgment and agreement between parties as was the case with *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd*.

[42] On the issue whether JDS is an execution proceeding, it is clear that, from the reading of s 3 of the Debtors Act 1957, the same is an execution proceeding.

[43] Hence the net result is that there is no modification or variation of the original judgment by virtue of the JDS order.

[44] Further, s 8 of the Debtors Act 1957 provides that an order for the payment of installments of a judgment debt shall not be a bar to proceedings in

A execution.

[45] On the presupposition that a bankruptcy proceeding is another mode of execution; the Federal Court case of *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1; [2015] 4 CLJ 561 held that the JC's right to issue a BN is pegged to its right to proceed with execution. As execution was not barred at the time when the BN was issued, then the right to issue the BN must be upheld.

[46] In addition, the JC is entitled to concurrently pursue all and any execution proceedings on the final judgment (refer to *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, *Moscow Narodny Bank Ltd v Ngan Ching Wen* [2005] 3 MLJ 693).

[47] Therefore based on the above authorities, the JC is entitled to commence bankruptcy proceedings against the JD concurrently with the JDS order.

Whether the JD had been in breach of the JDS order

[48] It was the finding of the learned judge that the JD had defaulted in the monthly installment that ought to have been paid to the JC, therefore the JD was in breach of the JDS order.

[49] From the evidence that was before the court, the JD had made payment after the BN was issued against the JD on 31 March 2015. The cheque for the installment payment was received by the JC's solicitor on 31 March 2015 at 4.15pm after the BN was filed. The cheque could only be cashed in on 1 April 2015. Effectively, there had not been any payment made before the BN was filed. The Supreme Court in *Re Chen Sing Chew; ex-parte: Oriental Tin Smelters Sdn Bhd* [1974] 2 MLJ 69 held that bankruptcy proceedings can be commenced where there was a default in the installment payments which was in breach of an order to pay by installments (ie a JDS). The court had held that:

... I hold that the bankruptcy proceedings have not been rendered invalid by the orders for payment of the judgment-debt by installments.

Whether the original judgment was nullified by the JDS order

[50] It was submitted by the JD that the JDS order allows the JD to make payment of the judgment debt by monthly installments and not one lump sum payment forthwith as was decreed by the original judgment. Therefore the JD contends that he no longer needs to comply with the original judgment.

[51] However, we disagree with the submission by the JD. The original judgment has never been set aside nor overturned on appeal and thus it remains valid and enforceable. The JDS order which allows for installment payments does not mean that it nullified the original judgment.

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[52] As s 8 of the Debtors Act 1957 provides that the JDS order is no bar to proceedings in execution, the JC is at liberty to commence bankruptcy proceedings although there is a JDS order. In the light of the JD's default in his payment under the terms of the JDS order, it is all the more reason for the JC to do so.

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Whether the BN is valid in the light of the different amount claimed

[53] The JD essentially claimed that the amount claimed in the BN was more excessive than the original judgment. As a result the BN is invalid, null and void ab initio. The JD raised the issue that the BN:

D

- (a) demanded in excess RM54.53 (which is the interest calculated at the rate of 5% from 11 August 2011–31 March 2015 on the costs of RM300, although the final judgment does not provide for the same);
- (b) does not include the maturity dates for the performance guarantees ('PG') and financial guarantee ('FG') banking facilities; and
- (c) failed to reflect payment already made by the JD ie on 31 March 2015 (ie the date when the BN was filed) the JD had made payment of RM1,500 pursuant to the JDS order to JC's solicitors by a bank draft. This payment is not reflected at all in the BN.

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[54] On the interest issue we agree with the learned judge that interest on costs is claimable from the date of judgment pursuant to O 42 r 12 of the Rules of Court 2012.

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[55] Counsel for the JD contended that the BN is vague and confusing as the JC failed to state the maturity dates of the PG facility and the FG facility. We found that the learned judge had not erred in this respect. The judgment clearly states the amount payable for the PG facility which is RM5.3m as at 28 February 2011 and interest chargeable on the sum thereon shall be at the rate of 3.5% above the JC's base lending rate calculated on monthly rests from 1 March 2011 until the date of full payment. As for the FG facility, the judgment provides for the interest rate of 3.5% above the JC's base lending rate calculated on monthly rests from 31 March 2009 (ie the maturity date of FG facility) until the date of full payment.

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- A [56] Further the BN and the statement of accounts (which was attached to the BN) reflected the computation of the outstanding amount due under both PG and FG facilities and show that it is in accordance with the judgment.
- B [57] In any event, a BN shall not be invalidated by the fact that the sum specified in the notice as the amount due, exceeds the amount actually due, unless the JD had given notice to the JC that he disputed the validity of the notice on ground of such mistake (refer to s 3(2) of the Bankruptcy Act 1967).
- C [58] Essentially the JD is challenging the amount specified in the BN, hence a notice as stipulated under s 3(2) of the Bankruptcy Act 1967 is required, which the JD failed to issue, which was one of the preliminary points raised by the JC.
- D [59] On the contention by the JD that the claim in the BN is excessive as it failed to take into account the payment already made by the JD on 31 March 2015, it is the finding of the learned judge that the JD only paid the monthly payment which was due on 13 March 2015 to the JC after the issuance of the BN.
- E [60] The learned judge had correctly stated in his judgment that the acceptance of payment by the JC does not nullify the BN as the outstanding amount due is over and above the statutory limit as provided under s 5(1) of the Bankruptcy Act 1967. The decision of the Federal Court in *Moscow Narodny Bank Ltd v Ngan Ching Wen* [2005] 3 MLJ 693 held that even if the amount claimed in the BN is excessive, the bankruptcy proceedings are not invalidated so long as the amount exceeds the statutory minimum sum of RM30,000 under s 5(1)(a) of the Bankruptcy Act 1967.
- F
- G Hence the BN is not invalidated even if it failed to take into account the part payment, as long as the balance sum claimed is above the statutory limit set by the Bankruptcy Act 1967, as in the present appeal that is before us. It is to be noted that the judgment sum is RM80m and the payment received is RM5,000, leaving a balance far above the RM30,000 statutory limit.
- H CONCLUSION
- I [61] Therefore, the bankruptcy jurisdiction under s 3(1)(i) of the Bankruptcy Act 1967 is validly invoked.
- [62] We therefore dismissed the three appeals with costs of RM15,000 for the three appeals subject to allocator and deposit refunded.

The three appeals dismissed with costs of RM15,000 subject to allocator.

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Reported by Dzulqarnain Ab Fatar

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